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7 Counsel for Defendant, The Hershey Company

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **OAKLAND DIVISION**

11 RYAN ZULEWSKI, JOHN DAVIS, ALEX
LANGAN, NICHOLAS ESPOSITO,
12 BRANDON TURNER, SHARRELL FISHER,
JAY COOK, MARKESSA CARTER,
13 RACHEL ECKROTH, CHRISTINA TYSON,
SHANE HUEY, DOMINICK IPPOLITO,
ROBERT CHURNEY, HARRY KLOS,
14 CONSTANCE COLE, BRITTANY
DANGERFIELD, TRACY DEBUS, TERESA
15 FLORES, CASSANDRA HALE, BRETT
KITTERMAN, AMY KRAMER, CHRIS
16 LANDERS, KIMBERLY LEKARCYK,
TYLER MCKENZIE, ANDREW MEEK,
17 DAVID RISSE, SUSAN SPOHN, MIKE
THOMPSON, YOLANDA TURNER, JENNA
18 VERRASTRO, and ERIN WADLEY, on their
own behalf and on behalf of all others similarly
19 situated,

20 Plaintiffs,

21 v.

22 THE HERSHEY COMPANY,

23 Defendant.

Case No. 4:11-CV-05117 (KAW)

[Hon. Kandis A. Westmore]

**DEFENDANT'S NOTICE OF MOTION
AND MOTION TO DENY CLASS
CERTIFICATION**

DATE: February 21, 2013

TIME: 11:00 A.M.

JUDGE: Kandis A. Westmore

ORAL ARGUMENT REQUESTED

24 **TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:**

25 **PLEASE TAKE NOTICE** that at 11:00 a.m. on February 21, 2013, or as soon thereafter
26 as the matter may be heard, in Courtroom 4 on the 3rd floor of the United States District Court for
27 the Northern District of California, Oakland Division, located at 1301 Clay Street, Oakland,
28 California, 94612, the Honorable Kandis A. Westmore presiding, Defendant hereby will and

1 hereby does move the Court to deny class certification.

2
3 Plaintiffs seek to certify a Federal Rule 23 class action on behalf of all RSRs in California
4 in addition to the nationwide Fair Labor Standards Act (“FLSA”) collective action on behalf of all
5 of Hershey’s Retail Sales Representatives (“RSRs”) that the Court has already conditionally
6 certified with the consent of The Hershey Company (“Hershey”). As Plaintiffs acknowledge, this
7 action alleges “federal and state overtime violations” that are “virtually identical” to the claims
8 that their same counsel brought against Hershey in a prior case in the Northern District of
9 California that was litigated for years and ultimately settled in 2011, *Campanelli v. Hershey Co.*,
10 Case No. 3:08-cv-01862-BZ (N.D. Cal. filed Apr. 7, 2008). (See Amended Complaint (Dkt. No.
11 12) ¶ 68.) Just as in *Campanelli*, this Court should find as a matter of law that a Federal Rule 23
12 class action is not a superior method for adjudicating the state law claims of the California RSRs,
13 as is required by Federal Rule 23(b)(3). The superior procedural path, as this Court in
14 *Campanelli* held, would allow California RSRs to opt-in to the FLSA collective action if they
15 wished and have their state law claims adjudicated based on the Court’s supplemental
16 jurisdiction. This Court has already begun to follow this procedural path by distributing a
17 separate notice of conditional collective action certification to all 53 California RSRs who were
18 not already plaintiffs in the case allowing them to pursue their California state law claims by
19 opting into this action. Only five of the RSRs who received this notice chose to opt into the case,
20 and of the remaining 48 RSRs, 29 also received notice in *Campanelli* and chose not to opt into
21 that case as well. These RSRs have demonstrated a complete lack of interest in pursuing claims
22 against Hershey and dragging them into this case via class certification is not a superior method
23 of adjudication. Further, Plaintiffs also cannot meet the numerosity, adequacy and typicality
24 requirements of Federal Rule 23(a). Accordingly, Defendant respectfully requests that the Court
25 deny class certification pursuant to Federal Rule 23(c)(1)(A) and strike Plaintiffs’ class claims
26 from their Second Amended Complaint pursuant to Federal Rule 23(d)(4).

27 This motion is made on the grounds set forth above and in the memorandum of points and
28 authorities and the Declaration of Kaley Miller filed in support of Hershey’s prior Motion for

1 Class Certification¹ (Dkt. No. 31) and is based on the material referenced therein and such oral
 2 argument as may be heard by the Court. This motion has already been fully briefed (*see* Dkt.
 3 Nos. 31, 57 & 83) and no further briefing is necessary.
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5 Dated: January 17, 2013
 6 Philadelphia, Pennsylvania

MORGAN LEWIS & BOCKIUS, LLP

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 8 By: /s Michael J. Puma
 9 Michael J. Puma

10 *Counsel for Defendant, The Hershey Company*
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 26 ¹ The Court declined to rule on Hershey's prior Motion to Deny Class Certification pending
 27 mediation between the parties and this motion was vacated, as were all other pending motions,
 28 when this case was reassigned from Judge Zimmerman to Judge Westmore, with an instruction to
 renotice for a hearing before Judge Westmore. (Dkt. No. 145).